

IN THE COURT OF APPEAL OF BELIZE AD 2020

CIVIL APPEAL NO. 15 of 2018

ZOYA DUSHUTINA	1st Appellant
VICTOR DUSHUTINA	2 nd Appellant
DELASO VENTURES LIMITED	3 rd Appellant
v	
ANDRII HOLIAKOV	Respondent

BEFORE:

The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal
The Hon Mr Justice Lennox Campbell	Justice of Appeal

S Duncan for the appellants/respondents
E Courtenay SC along with P Banner for the respondent/applicant

24 October 2019 and 18 September 2020

HAFIZ BERTRAM JA

Introduction

[1] This is an application for security for costs made by the respondent, Andrii Holiakov (Mr. Holiakov) by notice of motion issued on 18 February 2019. He is seeking an order pursuant to *section 18 of the Court of Appeal Act, Chapter 90* and *Rule 20 of Order II of the Court of Appeal Rules*, that the appellants give security for his costs in the appeal in this matter.

[2] In the claim below there were six defendants and Mr. Holiakov was the claimant. He claimed against the six defendants that he is entitled to be the sole owner of the 100% share capital of the first defendant, Delaso Ventures Limited (“the Company”), which is now the third appellant in this appeal. A settlement was entered between Mr. Holiakov and the second and fourth defendants by virtue of a Tomlin Order entered on 17 April 2018.

[3] An application was made on 17 April 2018 by the company, Zoya Dushutina (first appellant”) and Victor Dushutina (“second appellant”) for relief from sanctions. Abel J heard that application and by an order dated 18 April 2018, the judge ordered that since there was no appearance for the company and the first and second appellants, when the matter came up for trial, the application for relief from sanctions was dismissed.

[4] The court declared that since the 6 June 2012, Mr. Holiakov has been the sole owner and director of the company. The judge also ordered that security of costs ordered by the court on 24 July 2015, be released to the attorney for Mr. Holiakov. Prescribed cost was also ordered against the first and second appellant. The trial judge stipulated the claim to be valued at US\$6 million and ordered the costs to be paid on or before the 31 May 2018.

[5] On 29 May 2019, the company and the first and second appellants appealed the decision of Abel J, which is set out in the order dated 18 April 2018. The present application by Mr. Holiakov is for security for costs of the appeal.

[6] The Court heard the application for security of costs on 24 October 2019, and reserved its decision.

Orders sought by Mr. Holiakov

[7] By the Motion dated 18 February 2019, Mr. Holiakov sought the following orders:

1. "An order pursuant to section 18 of the Court of Appeal Act and Rule 20 of Order II of the Court of Appeal Rules that the appellants give security for the 1st Respondent's ("Mr. Holiakov") costs in the sum of \$146,250.00;
2. An Order that the appeal be stayed until such time that the security for costs is provided, being no later than one month (31 days) from the making of the Order for security;
3. An Order that the appeal shall stand dismissed with costs in the event that the security for costs is not provided within one month (31 days) of the date of the Order for security;
4. An Order that the appeal of the 3rd Appellant be stayed until such time as the said Appellant is able to prove that the said appeal has been authorized by the 3rd Appellant and that Counsel for the 3rd Appellant is duly authorized to file the said Appeal, failing which the appeal shall stand dismissed;
5. Further, or other relief deemed just; and
6. An Order that the costs of this application be costs in the cause."

Grounds of the application for security for costs

[8] The grounds of the application for security for costs are:

1. The first and second appellants are ordinarily resident outside of the jurisdiction and did not appear for trial of the claim or for any scheduled hearing of the claim in the Supreme Court;
2. The first and second appellants have no assets in Belize to satisfy any order of costs in favour of Mr. Holiakov if he was to succeed on appeal and the said appellants have not to date paid Mr. Holiakov costs of the claim in the Supreme Court;
3. Mr. Holiakov wrote to the appellants on the 1 October 2018, requesting that the appellants agree to deposit with their counsel

appropriate security for costs in the sum of BZ\$146,250.00 no later than 30 days from the date of the letter which Mr. Holiakov indicated was in its belief a reasonable estimate to cover the costs of the appeal (inclusive of senior counsel, junior counsel and general sales tax);

4. Mr. Holiakov seeks the payment of the security for costs one calendar month before the written submissions are due to be filed with the Court of Appeal to avoid Mr. Holiakov incurring additional costs in the event that the security is not paid and the appeal not heard;
5. Mr. Holiakov has not received any response to the request for security for costs;
6. Mr. Holiakov states that it is in the interests of justice that security for costs in the sum requested be deposited with his counsel at least one month before the written submissions are due to be filed with the Court of Appeal by the parties and that if the said security is not paid as ordered that the appeal shall stand dismissed;
7. Mr. Holiakov states that the company is and has always been his company and that he has not authorized the filing of the appeal by the company. Therefore, it is in the interest of justice that the company provide proof that it has duly authorized the filing of the appeal and that counsel for the company are likewise authorized to conduct the appeal, failing which the appeal by the company shall stand dismissed.

Evidence in support of the application

[9] The application for security for costs is supported by the affidavit of Pavlina Moore sworn on 18 February 2019.

[10] Ms. Moore deposed that the first and second appellants did not appear for the hearing of the trial notwithstanding they were witnesses in the matter and the trial had been rescheduled twice. Further, that the appellants had never appeared in court during the conduct of the proceedings in the court below.

[11] At paragraph 7 of the affidavit, Ms. Moore deposed that according to the affidavit evidence of the first and second appellants filed for the trial, they are both resident in the Ukraine and/or Russia.

[12] Ms. Moore deposed at paragraph 8 of the affidavit that counsel for Mr. Holiakov informed her that the request for security for costs was made on the basis that the appellants are resident outside of the jurisdiction of Belize and that enforcement of a costs order against them in the Ukraine and/or Russia will be virtually impossible. She exhibited a letter from Mr. Holiakov's counsel showing that by letter dated 1 October 2018, a requests was made for security for costs for the sum of \$146,250.00 to be deposited with counsel no later than 30 days from the date of the letter.

[13] She further deposed at paragraph 9 of the affidavit that the appellants have not responded to the letter for security for costs and it appears that they have no intention of complying with the requests.

[14] Ms. Moore deposed that she was advised by counsel that the costs of the present appeal is estimated to be BZ\$146,250.00 and she exhibited a proposed Bill of costs.

[15] At paragraph 11 of her affidavit, she deposed that in the court below, the trial judge ordered prescribed costs in favour of Mr. Holiakov on the claim valued at US\$6 million, which is \$170,000.00, and to date the said costs has not been paid.

[16] Ms. Moore further deposed that none of the appellants have assets in Belize to enable Mr. Holiakov to satisfactorily enforce any order for costs made against the appellants in the appeal. Further, that attempts to recover costs would be costly, oppressive, protracted and impossible. As such, in the interest of justice the security for costs requested should be deposited with counsel for the appellants.

[17] She further deposed that Mr. Holiakov stated he has not authorized the filing of the appeal by the company. As such, proof should be provided that the company authorized the filing of the appeal and that counsel for the appellants is authorized to conduct the appeal.

Evidence in opposition to the notice of motion for security for costs

[18] In an affidavit sworn on 19 March 2019, the first appellant deposed that she is the wife of the second appellant and the affidavit is given in opposition to the notice of motion for security for costs filed on behalf of Mr. Holiakov.

[19] She deposed that herself and the second appellant migrated to Canada from Russia and they have been residing in Canada since 2016. Further, they are now residents of Canada. See Exhibit 'ZD-1', for proof of residence.

[20] The first appellant deposed that they have no assets in Russia and no assets in Canada. She stated that they are living in a rental. Further, she is 80 years old and her husband is 83 years old. They are both clinically disabled and depend entirely on their son to survive since they do not receive any pension. The first appellant exhibit their bank statements. See Exhibit 'ZD-2' for the bank statements.

[21] At paragraph 5 of the affidavit, the first appellant deposed that the order of the court below had the effect of giving ownership in their company which held all their assets roughly US\$6 million, to Mr. Holiakov. Further, if they are ordered to pay security for costs they will likely default due to inability to pay and the appeal will be struck out, thus, stifling the appeal.

[22] The first appellant deposed that the order of the trial judge was made summarily without the judge hearing evidence from them. She stated that her attorney-at-law informed her that the paramount issue the trial court had to decide was which party's transfer of shares documents were authentic. This

issue depended on the expert opinion of a forensic analyst but no such opinion was given to the trial court before the judge made the order that ownership should be given to Mr. Holiakov.

[23] At paragraph 8 of the affidavit, she deposed that their assets that were held by the company included a list of properties which she exhibited as 'ZD-3'.

[24] She further deposed that the application for security for costs should be dismissed as she was informed by her attorney and verily believe that:

- (a) The application discloses no special circumstance warranting an order for security for costs;
- (b) The amount sought as security for costs is excessive and the Bill of Costs provided does not adequately show how the sum being claimed as security was determined;
- (c) Enforcement of judgments in Canada would not be impossible;
- (d) Mr. Holiakov will not be prejudiced by the refusal of an order for security for costs.

Affidavit of Mr. Holiakov in response to the affidavit of the first appellant

[25] Mr. Holiakov in his affidavit filed on 3 May 2019, stated that his affidavit is in response to the affidavit of the first appellant.

[26] He deposed that the appellants have not provided any objective information which demonstrates that they are actually living in Canada. Further, that the first appellant has been using a Belize City address as her service address.

[27] In relation to the information on the bank statements, Mr. Holiakov deposed that he does not accept that the Bank Account Statements represent the actual financial holdings of the appellants. Also, that there is no certified bank

statement from CIBC bank which demonstrates all the deposits and withdrawals from the two bank accounts of the appellants. Further, the details provided on the accounts give information from January to March 2019, notwithstanding that they have been residing in Canada since 2016.

[28] As for the properties referred to in exhibit ZD-3 of the affidavit of the first appellant, Mr. Holiakov deposed that these properties are not currently owned by the company.

Submissions on behalf of Mr. Holiakov

[29] Mr. Courtenay SC for Mr. Holiakov submitted that the appellants are resident outside of Belize and do not have assets located within the jurisdiction. He referred the Court to, *The Supreme Court Practice 1997 (The White Book) O.59, r.10 (59/10/21)* which states the following:

“Residence out of the jurisdiction – It has long been the practice of the Court of Appeal to order provision of security where the appellant is resident abroad (see e.g. **Grant v Banque Franco-Egyptienne** (1877) 2 C.P.D. 430). Recently, it has been necessary (in relation to the impact of European Community law) to consider what the rationale of that practice is. The rationale is undue delay or expense in enforcing the cost order abroad.

[30] Senior counsel relied on the case of **Grant**, where the English Court of Appeal found that the fact the appellant (a French Corporation) is a foreigner domiciled abroad with no assets in the jurisdiction of the court, was a “special circumstance” within Order LVIII, Rule 15, which entitled the respondent to security for costs of the appeal. Counsel referred to page 431 of the judgment where Brett LH stated that, “*I am of the opinion that the fact that the appellants are foreigners not domiciled in England is of itself a ‘special circumstance’ within the rule sufficient to entitle the respondents to security for costs of the appeal.*”

[31] Mr. Courtenay SC further relied on **Re Baum ex p Isaacs** (1878) 9 Ch D 271, where it was held by the English Court of Appeal that the court can in special circumstances, increase the amount of a deposit to any extent after the entry of an appeal.

[32] Senior counsel submitted that the sum of \$146,250.00 that Mr. Holiakov is seeking as security of costs is reasonable given the complexity of the issues as shown by the five grounds of appeal.

Submissions for the appellants

[33] Learned counsel, Ms. Duncan for the appellants submitted that the motion for security for costs by Mr. Holiakov was significantly delayed with no reason offered for such delay. As such, this should be a bar to requests security at this stage. Counsel relied on Rule 20 of the Rules which provides that the application for security for costs must be made promptly. She submitted that the appeal was filed on 29 May 2018 and a letter demanding security for costs was sent to the appellants on 1 October 2018. The application for security for costs was made on 18 February 2019, which is five months delay. She contended that this delay is unjustifiable and not in compliance with the rules that the application must be made promptly. Therefore, the Court ought not to entertain the application for security for costs.

[34] Ms. Duncan made further arguments on the substance of the motion, that is, on the issue of residency, impecuniosity and the bill of costs of counsel for the applicant.

[35] Ms. Duncan argued that the current law is that security for costs will not be awarded merely because the litigant is a foreigner. She relied on **Marjorie Knox v John Deane** et al CCJ App No. 8 of 201, where the CCJ reiterated the principle that foreignness is not an automatic ground for the ordering of security for costs.

[36] On the issue of impecuniosity, counsel argued that the appellants are elderly people with clinical disabilities, do not earn a pension and depend on their son for survival. Also, they do not have assets in Belize. As such, they are impecunious. Counsel argued that the *Knox* case confirms that not having assets within the jurisdiction is not a point that Mr. Holiakov can rely upon as a special circumstance.

[37] Ms. Duncan submitted that the test was propounded in **Bestfort Developments LLP et al v Ras Al Khaimah Investment Authority and Others** [2016] EWCA Civ 1099. Also, it was accepted by this Court in **Fort Street Tourism Village v Suzanne Kilik**, Civil Appeal, No. 26 of 2016. Counsel submitted that the test has two elements, that is: (1) an applicant for security of costs has to show real risk of an obstacle or burden of enforcement or likelihood of such obstacle or burden, and (2) the evidential standard for real risk or likelihood.

[38] Learned counsel submitted that the appellants have no money and there is no evidence presented by Mr. Holiakov that shows a real risk. Further, if the Court orders them to pay security for costs, the appellants will not be able to comply. She argued that there must be a balancing exercise and the contra position is that the appellants appeal will be stifled by any security for costs order. Ms. Duncan further contended that the appeal has a real prospect of success. As such, these two factors tilt the balance in favour of not granting the order for security.

[39] In relation to the Bill of Costs submitted by counsel for Mr. Holiakov, Ms Duncan submitted that it is wholly inadequate. She referred to Order II, Rule 30 of the Court of Appeal Rules, which provides that the taxation of professional legal fees must appear to be necessary or proper for the attainment of justice. She submitted that the bill for counsel sets out a description of the works and the amount claimed but, there is no breakdown of approximate hours spent, nor any

indication whether the amount claimed is for senior counsel or junior counsel or both. Counsel referred the Court to the **Knox** case which shows that the Court has to explore the actual or likely costs of the appeal.

[40] Ms. Duncan submitted that the security being sought is the same amount as the full legal costs in the claim and this figure cannot be equal to the total anticipated costs of the appeal.

[41] Counsel further submitted that the Court must conduct a balancing exercise as to the rights of the parties and consider where the greater prejudice will lie. She relied on the principle stated by Nelson JCCJ, "*In the hands of an opponent, it may be used as a weapon to stifle claims and to crush resistance. Security for costs is an important derogation from the principle of justice.*"

Discussion

Security for costs in the Court of Appeal

[42] The power of the Court of Appeal to order security for costs on appeal is found in section 18 of the *Court of Appeal Act*, Chapter 90 of the Laws of Belize. Section 18 of the Act provides as follows:

“The Court may make any order as to the whole or any part of the costs of an appeal as may be just and may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just.”

[43] Pursuant to section 18, the Court has a discretion whether to order security for costs after taking into consideration all the relevant circumstances.

[44] Further, in compliance with section 18, the applicant Mr. Holiakov, has to prove that there are “**special circumstances**” which would cause difficulty in enforcing a costs order against the appellants. This section also shows that the order given by the Court for the costs of the appeal shall be “**just**”. Therefore,

the Court cannot give costs which is arbitrary and must consider all the relevant circumstances of the case.

[45] There are also other factors which has to be considered by the Court as shown by *Order II, Rule 20* of the Court of Appeal Rules (in so far as is relevant). It provides:

“20 (1) Before an application for security for costs is made, a written demand shall be made by the respondent and if the demand is refused or if an offer of security be made by the appellant and not accepted by the respondent, the Court or the Court below shall in dealing with the costs of the application consider which of the parties has made the application necessary.

(2) An application for security for costs may be made at any time after the appeal has been brought and must be made promptly thereafter.

(3) An order for security for costs shall direct that in default of the security being given within the time limited therein, or any extension thereof, the appeal shall stand dismissed with costs.”

[46] The application must therefore be made promptly. Also, if an order for security for costs is given, the Court shall direct that in the event of default of the time stipulated in the order, the appeal shall be dismissed. A prior written request must also be made for security for costs as shown in subsection (1).

Prior written request for security

[47] There was compliance with the rules by Mr. Holiakov as there was a prior written request by his counsel for security for costs. Ms. Moore deposed that a request was made for security for costs in the sum of \$146,250.00 to be deposited with counsel no later than 30 days from the date of the letter. She further deposed that the appellants have not responded to that request.

Whether application made promptly

[48] Ms. Duncan submitted that the application for security for costs was made on 18 February 2019, which is five months delay and that this is unjustifiable since the rules provide that the application must be made promptly. There is no definition of promptly in the rules and as such the Court has to examine the steps taken since the appeal was filed. This matter has not gone past case management conferences and therefore, it is my view, that no prejudice had been caused by the five months delay.

Special circumstances

[49] The evidence of the first appellant is that herself and the second appellant presently reside in Canada. She deposed that she and the second appellant have migrated to Canada from Russia and they have been residing there since 2016.

[50] The evidence of Mr. Holiakov is that there is no objective information which demonstrates that the appellants are actually living in Canada. The evidence of Ms. Moore for Mr. Holiakov is that the request for security for costs was made on the basis that the appellants are resident outside of the jurisdiction of Belize and that a costs order against them in Ukraine and/or Russia will be impossible.

[51] Ms. Moore also deposed that the appellants have no assets in Belize to enable the applicant to enforce any costs order made against the appellants in the appeal. Further, attempts to recover costs will be oppressive, protracted and impossible.

[52] As shown by the evidence, there is no doubt that the appellants are resident out of the jurisdiction. Further, there is not sufficient evidence which proves that the appellants are permanently residing in Canada. Regardless, whether they reside in Russia or Canada there will be difficulty in enforcement as Zoya deposed that they have no assets in Canada or Russia.

[53] Ms. Duncan argued that they are impecunious. In the case of **Grant** relied upon by Mr. Courtenay, a foreigner domiciled abroad with no assets in the jurisdiction of the Court was a “special circumstance” within Order LVIII, Rule 15 which entitled the respondent for security for costs. In the case of **Knox**, relied upon by Ms. Duncan foreignness and poverty are no longer *per se* automatic grounds for ordering security for costs.

[54] In my view, the Court has to consider the particular circumstances of the case before making an order for security for costs. The fact that the appellants are resident out of the jurisdiction without sufficient evidence of a permanent address and have no assets in Belize (the jurisdiction of the Court) nor in Russia and Canada, are special circumstances which entitle Mr. Holiakov to security for costs of the appeal.

Prospect of success

[55] The main issue in this matter concerns ownership of a company. Mr. Holiakov who was the claimant in the court below claimed that he was entitled to be the sole owner of the company. Abel J declared that since 6 June 2012, Mr. Holiakov had been the sole owner and director of the company. There was no trial of the claim since there was no appearance for the company and the appellants.

[56] Ms. Duncan submitted that the appeal has a real prospect of success since the trial court had to decide on the authenticity of transfer of share documents and this was done without hearing the expert opinion of a forensic analyst. Counsel for the applicant for security for costs has not shown to this Court that the appeal has no prospect of success except for a statement as such.

[57] Based on the pleadings and submissions made by counsel, I am of the view that it cannot be said that there is a high degree of success or failure in relation to the ownership of the company. Therefore, I do not find it necessary to

delve into the merits of the case. See the case of **Porzelack KG v Porzelack (UK) Ltd.** [1987] 1 All ER 1074, 1077 cited in the **Knox** case.

Stifling of the appeal

[58] The first appellant, Zoya deposed that she and her husband are impecunious and as such if an order is made for security for costs the appeal will be stifled. She did not say that she is unable to raise the security from other sources, including from her son who is supporting her and her husband. Further, Zoya has not shown how she is able to fund the appeal. I am not satisfied that the Court was given sufficient financial information from the Bank in Canada to show impecuniosity. As such, I am not persuaded that it is probable that the appeal will be stifled if an order is made for security for costs.

Is it just to make an award for security for costs

[59] There is no evidence from Zoya that she can make an effort to raise the security either personally or through her son. Further, there is no assistance from Ms. Duncan as to the likely costs to be incurred for the appeal. Ms. Duncan raised the issue of authenticity of transfer of share documents and that the trial judge made the order granting ownership to the respondent without expert opinion. But, no assistance was given to the Court as to the likely costs of getting such opinion and also the likely costs of the appeal which consists of five grounds of appeal. In my view, the Court should be given assistance from both parties as to likely costs and not only from the applicant.

[60] The applicant has requested \$146,250.00 as costs for the appeal. I have considered the Bill of Costs and it is my opinion that the likely cost to be incurred, bearing in mind the grounds of appeal, is \$70,000.00. I would therefore, propose the sum of \$70,000.00 as security for costs for the appeal.

Authorization of appeal by the Company

[61] The application which is properly before the Court is one for security for costs. There will be no determination on the order sought for the appeal of the company to be stayed until proof is shown that the appeal has been authorized.

[62] For the foregoing reasons, the following is ordered:

Order

- (i) The first and second appellants give security for costs for the appeal in the sum of \$70,000.00 within 30 days;
- (ii) Appeal be stayed pending payment of the security for costs;
- (iii) The \$70,000.00 to be paid in an escrow account of the appellant's counsel;
- (iv) Pursuant to section 23 of the Act, the appeal shall stand dismissed, if the security for costs is not paid within the 30 days period.
- (v) Costs of the application to be taxed, if not agreed.

HAFIZ-BERTRAM JA

DUCILLE JA

[63] I have perused the draft judgment of Hafiz-Bertram JA and I am in total agreement with her reasoning and disposition.

DUCILLE JA

CAMPBELL JA

[64] I have read the draft judgment of Hafiz Bertram JA and I am in agreement with her reasoning and conclusion therein.

CAMPBELL JA